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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 619

ARTHUR L. HARRIS, SR., ARTHUR L. HARRIS, JR., ERNEST F. LEA, CHARLES W. MARSHALL,

Petitioners,

vs.

UNITED STATES OF AMERICA

APPLICATION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI; AND MEMORANDUM.

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APPLICATION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Counsel for petitioners has been privileged to listen to the oral argument just heard by this Court in the eight cases involving the applicability or non-applicability of the *Jencks* case and/or the Jencks statute.[1] Counsel for petitioners are also familiar with the briefs in those cases.[2]

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[1] *Ley* v. *United States*, No. 435; *Wool* v. *United States*, No. 436; *Rubin* v. *United States*, No. 437; *Rosenberg* v. *United States*, No. 451; *Palermo* v. *United States*, No. 471; *Scales* v. *United States*, No. 488; *Pittsburgh Plate Glass Co.* v. *United States*, No. 489; *Gulax Mirror Co., Inc.* v. *United States*, No. 491.

[2] With the consent of the parties, petitioners filed a brief *amici curiae* in one of them, *Rosenberg*, No. 451.

As a result thereof, we are convinced that irrespective of what the Court does in those eight cases, the instant case is sufficiently different and presents a point of such compelling importance as to warrant the grant of certiorari herein.

Hence application is made for leave to file the attached Memorandum to demonstrate that contention.

Respectfully submitted,

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Attorneys for Petitioners.

DOUGLAS BADT,
Of Counsel.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

By its—for the first time before this Court—concession (Br. in Oppos. 16) that the trial court committed clear error under both the *Jencks* case (353 U.S. 657) and the Jencks statute (18 USC 3500),[3] the Government has sought to narrow the scope of the questions raised by the petition for writ of certiorari. We acknowledge that the Government can confess error, and is to be commended for so doing. But we do not believe that thereby—by abandoning before this Court the very contention which led the two courts below into error—the Government can improve its position and defeat petitioners' right at least to be heard.[4]

In any event, as we shall show, the Government's elimination from the case of the issue as to whether petitioners were entitled to production of the statements, does not invalidate the other cogent reasons as to why certiorari should be granted. Indeed the narrowing of the issue by the Government, in the circumstances of this case, increases the necessity for the granting of the petition.

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[3] Cf. decision of the Court of Appeals in the *Lee-Wood-Rubin* case, R. 85.

[4] Cf. the Government's argument in its brief in the *Rosenberg* case, pg. 65: "This position, taken at the trial, cannot be abandoned on appeal for supposed advantages to be gained by a contrary contention at the present stage."

I

Even if in All the Other Cases this Court Were to Find Harmless Error and Affirm, the Problem Present in this Case Would Still Be Undecided.[5]

The situation in the instant case is not present in any of the other cases where the Government has raised the harmless error point. Here *neither* the court below nor the trial court ever saw the statements. And, presumably, neither has this Court, nor will it.[6] Indeed, we feel safe in saying that neither have Government counsel before this Court seen the statements.[7] So that they are arguing harmless error in a vacuum and they are asking this Court to deny certiorari based upon the same lack of information. In none of the other cases is this so.

In the *Lev-Wool-Rubin* cases, the Court of Appeals saw the summary (and based its decision on its personal knowledge). In the *Rosenberg* case, *both* the trial court and the Court of Appeals saw the documents. The same is true in *Palermo*. And in all these cases, the "sealed envelopes" are before this Court.[8] Accordingly, it could be said,

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[5] When we speak of the other cases, we are really referring to the *Lev, Wool, Rubin, Rosenberg* and *Palermo* cases, for apparently in the other three—*Scales, Pittsburgh Plate Glass* and *Galax Mirror*—the Government makes no harmless error argument, although at the argument in the *Galax* case, Government counsel did say that they had a case without Jonas. Of course, the text to this footnote presupposes that the Court holds the documents to have been producible and that the "no-prejudice, harmless error" doctrine applies even if there has been a clear violation of the *Jencks* rule or the Jencks statute. Cf. brief of amici curiae in the *Rosenberg* case.

[6] At least to petitioners' knowledge, there is no "sealed envelope" lodged with the Clerk of this Court into which the members of this Court can look.

[7] Cf. the *Lev-Wool-Rubin* cases where in oral argument Government counsel advised the Court that through the "courtesy" of the Clerk of this Court he had seen the "summary."

[8] Though never seen by defense counsel.

arguendo, that there was *some* basis for a "harmless error" ruling. Not so in the case at bar.

Nor can it be said of this case, as the Government says in *Rosenberg* (Br. pp. 17, 25; and at oral argument), that the documents here are "peripheral." As the blank form of the questionnaire shows (Appx. E to petition) the documents denied the petitioners pertained to the very testimony of the witnesses in court, even as to the form of the questions, and as to all the facets thereof (cf. Petition, pg. 6). Similarly, it can not be said in this case, as the Government says in the *Lev-Wool-Rubin* cases (Br. 26 and at oral argument), that the testimony of the witnesses did not involve petitioners or that they related to a time long before petitioners entered the alleged conspiracy and so the witnesses did not implicate them, or that the witnesses' testimony was corroborated by petitioners' or that the witnesses were secondary. And it can likewise not be said in this case, as the Government says in *Palermo* (Br. 23-24), that "defense counsel did receive, and fully use in unrestricted cross-examination of the witness, other lengthy, pre-trial statements covering the same subject matter."[9]

Moreover, the Government's argument to this Court in the other cases demonstrates that even the Government considers this case different from those on the harmless error point and that it really agrees with petitioners. Thus in its brief in *Palermo*, the Government said (pg. 23):

> "In *Jencks*, the unproduced documents had not been exhibited to and examined by the courts below; *accordingly, those courts could not discharge any duty of*

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[9] The same thing was true in *Rosenberg*, where the Court "lean[ed] over backwards" (R. 47-48; Govt. Br. 13) in giving defense counsel access to all sorts of documents, including the grand jury testimony. Cf. also the *Galax* case where defense counsel were given access to the very notes the prosecuting attorney took when he interviewed the witness preparatory to trial.

determining whether denial of production had been harmless." (Second italics added)

Precisely!

And the Government, this time in *Rosenberg* (Br. 49), also explained *Jencks* as meaning that "the Court felt it would be unfair to deny the defense access to statements of the witness, attributable to the witness, which do relate to the testimony of the witness at the trial." Again: precisely!

Furthermore, although the Government argues here, without its present counsel or the courts below having seen the statements, that only harmless error had occurred, in the *Lee-Wool-Rubin* cases it acknowledged (Br. 22) that in a statement of the witness to be used for impeachment purposes "these subtle variations are *significant*" (italics added) and that (Br. 62-63) even in a case "in which the jury found defendants guilty on the basis of overwhelming evidence" [10] a "serious defect in procedure might nonetheless require a new trial." We suggest that both these considerations are present here; that defense counsel were entitled to examine "these subtle variations" and that the refusal of the trial court to permit this was, indeed, a "serious defect in procedure." So that a harmless error argument in this case is inapposite.

Accordingly, whatever the outcome of the cases as to which oral argument has just been heard, the factual situation in the instant case—where neither court below saw the admittedly producible statements—presents, even on the theory of the Government, a case for the granting of certiorari on the very question as to whether the harmless error doctrine can apply.

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[10] A proposition we say does not obtain here.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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